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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-995

MARTIN L. ALTBAUM,
Petitioner,

versus

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL — STATE OF CALIFORNIA

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL — STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

The Petitioner, MARTIN L. ALTBAUM, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal, Fourth Appellate District, State of California, entered September 28, 1978.

OPINIONS BELOW

The Court of Appeal, Fourth Appellate District, State of California, rendered its opinion on July 14, 1978. A copy of the opinion is attached as Appendix A. The Supreme Court of the State of California denied Petitioner's Petition for a Hearing on September 20, 1978. A copy of said Notice of Denial is attached hereto Appendix B. The opinion of the Court of Appeal was entered on September 28, 1978. A copy of the Remittitur is attached hereto as Appendix C.

JURISDICTION

On September 28, 1978, the Court of Appeal entered judgment reversing the judgment of the trial court as to Counts III, IV, VII, VIII and IX and affirming the judgment as to Counts I and II. Counts I and II charged that Petitioner violated California Penal Code §496.1 on August 6, 1976, and August 20, 1976, respectively.

The jurisdiction of this Court is involved under Title 28, United States Code, §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the search of Appellant's business and seizure of property therein on August 6, 1976, violated the Fourth Amendment?

2. Whether the search of Appellant's residence and seizure of property therein on August 6, 1976, violated the Fourth Amendment?

3. Whether Appellant was questioned and statements made in violation of the Fifth Amendment?

4. Whether the August 20, 1976, search of Appellant's business and the evidence seized therein was the "poisonous fruit" of the August 6, 1976, search in violation of the Fourth Amendment?

5. Whether the judgment of conviction was insufficiently supported by the evidence in violation of the Fourteenth Amendment?

6. Whether the alleged harmful instruction given by the Court was "harmless" or a violation of the Fifth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

1. UNITED STATES CONSTITUTION, AMENDMENT IV:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. UNITED STATES CONSTITUTION, AMENDMENT V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. UNITED STATES CONSTITUTION, AMENDMENT XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

STATE STATUTES

CALIFORNIA PENAL CODE SECTION 496.1:

"Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, withholds or aids in concealing or

withholding any such property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison for not more than 10 years, or in a county jail for not more than one year; provided, that where the district attorney or the grand jury determines that such action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed two hundred dollars ($200), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in the county jail not exceeding one year."

STATEMENT OF THE CASE

A. PRE-TRIAL MOTIONS AND TESTIMONY

Points I, II, and IV below, raise issues that were presented at pre-trial Motions to Suppress Evidence pursuant to Penal Code Section 1538.5. These Motions were heard before the Honorable JOSEPH A. KILGARIF [See Reporter's Transcript of Hearing on Motions before Judge Kilgarif (hereinafter KIL.), which will be lodged with this Court should hearing be granted (C. T. 3-150; 153-160)].

Prior to the Motions being heard by Judge Kilgarif, they were initially held before the Honorable PAUL E. OVERTON (C. T. 153-155). On January 5, 1977, the Motions were mistrialed by agreement of both parties and reheard before Judge Kilgarif (C. T. p. 155). Judge Kilgarif incorporated the Reporter's Transcript of hearing on the Motions before Judge Overton (hereinafter OVER.) into consideration of the Motions held before himself. (KIL. p. 261).

On August 6, 1976, Officer DONALD E. HAMLIN, San Diego Police Department, received information (OVER. p. 255) from a confidential informant that appellant may have stolen property in his possession at appellant's place of business, "The Coin Mart" located at 255 Third Avenue,

Chula Vista, California (KIL. p. 37-38). Further, Officer Hamlin had information that appellant was knowingly in possession of stolen property. (OVER. p. 244). The property was alleged to have been taken in a June 5-7, 1976 burglary of QUON MANE'S IMPORTS, La Jolla, California (C. T. p. 128). Officer Hamlin went to the District Attorney's Office with a copy of a list of an inventory of stolen items taken from QUON MANE'S store (KIL.p. 7). Officers Hamlin and Warnberg prepared search warrants for both appellant's business and his residence. (KIL. p. 14-15). Officer Hamlin was aware that a copy of the Quon Mane inventory had been directed to the Honorable DAVID M. GILL, Judge of the San Diego Municipal Court (later search warrant issuing magistrate) (KIL. p. 16). Officer Hamlin discussed the possibility of a search warrant being issued for appellant's business with a Deputy District Attorney (OVER. p. 265).

Officer Hamlin contacted Mr. King Quon, owner of QUON MANE'S IMPORTS by telephone from the District Attorney's office and made arrangements to meet with him at approximately 5:00 o'clock P.M., that day. (OVER. p. 266). Prior to proceeding to the Coin Mart, Officer Hamlin told Sergeant Berglund, San Diego Police Department, to call and advise the Chula Vista Police Department that San Diego Police Department would be executing a search warrant at the Coin Mart. (OVER. 249, l. 9-16).

Officer Hamlin testified that at approximately 6:00 o'clock P.M., on August 6, 1976, he proceeded to the Coin Mart with Mr. King Quon (OVER. p. 228-229). Shortly after arriving at the Coin Mart (described as a pawn shop, second hand store) he and Mr. Quon entered the store. (OVER. p. 229). Once inside the store, Mr. Quon and Officer Hamlin walked around and looked at the various display cases that were inside the store (OVER. p. 230). Quon indicated to Officer Hamlin that some jade items of jewelry were his. (OVER. p. 231). After exiting the store,

Mr. Quon described the items he had seen in the Coin Mart while Officer Hamlin compared the items described with the Quon Mane stolen property list. (OVER. p. 232). At approximately 5:50 P.M., Officer Hamlin and Sergeant Berglund re-entered The Coin Mart, walked to the rear of the store, made contact with Appellant and identified himself as a San Diego Police Officer. (OVER. p. 234).

Officer Hamlin testified that after he advised appellant that he was there to conduct an investigation, and that possibly there was stolen property on his premises, (OVER. 234) Hamlin and appellant walked to the front of the particular display case that Mr. Quon had pointed out the items belonging to Quon Mane's (OVER. p. 235). Officer Hamlin inquired of appellant about those particular items (OVER. p. 235) and asked appellant if he could show any invoices for the items. (OVER. p. 24).

After that time, Officer Hamlin advised appellant of his constitutional rights (OVER. p. 260). Officer Hamlin initiated a call at approximately 6:15 P.M., to San Diego County Deputy District Attorney Prager, to try to obtain a telephonic search warrant, and was subsequently hooked up on a telephonic conference call with Judge Gill (OVER. 260-261). Officer Hamlin testified that the doors of the premises were locked "Just prior to about almost maybe simultaneously, or within a few minutes of the call to Mr. Prager." (OVER. p. 26, 1. 4-21).

Officer Hamlin testified that prior to going to the Coin Mart, the confidential informant had also advised him: "He stated to me that he had had conversations with Mr. Altbaum and during those conversations Mr. Altbaum had stated that he often kept stolen property at his residence; that in some cases he took certain pieces of property and made gifts to his family, and kept others for the family use, as well as some property there for safekeeping." (OVER. p. 263, 1. 15-20). There is no indication as to *when* the informant's alleged conversations with appellant had occurred. (C. T. p. 134).

On August 6, 1976, Judge Gill issued a telephonic search warrant for The Coin Mart and for appellant's residence located at 35 El Rancho Vista, Chula Vista, California. (C. T. p. 23-24). The residence and the Coin Mart were subsequently searched and numerous items seized from both places. (C. T. p. 106).

At the Motion to Suppress Evidence, appellant testified that while working in The Coin Mart at approximately 5:05 to 5:10 p.m., on August 6, 1976, he observed Officer Hamlin enter with Sergeant Berglund and another unidentified officer (KIL. p. 44). That from his position in the back of the store, the entire public area of the store was completely visible to him. (KIL. p. 44, 1. 15-19). That Officer Hamlin identified himself as a San Diego Police Officer and asked appellant to come up to the first showcase (KIL. p. 45). At the showcase, Officer Hamlin pointed to the showcase and said "Are these your, or words to that effect" (KIL. p. 46, 1. 14-17). Hamlin then said, "We're conducting an investigation, what we believe to be stolen merchandise, and want to ask you some questions about that." (KIL. p. 46, 1. 18-20). Prior to that time appellant had not been admonished of his constitutional right to remain silent. (KIL. p. 46, 1. 11-13). Appellant testified that the front doors of the business are normally kept open until 6:00 P.M., (KIL. p. 46), but that at approximately 5:15 to 5:18 P.M., the doors were closed by an employee upon order of the Police Officers to close and lock the doors (KIL. p. 48, 1, 1-16). Appellant did not observe Mr. Quon enter the store until approximately 6:00 P.M. (KIL. p. 48). Appellant testified that it was impossible for Mr. Quon to have entered the store prior to the doors being locked. (KIL. p. 59). Appellant and two employees were instructed to sit in front of the desks, not to make any moves, or do anything while Officer Warnberg stood nearby making sure that those instructions were followed. (KIL. p. 49). During the course of his initial

contact with Officer Hamlin, appellant did not feel free to leave and appellant's request, on at least five occasions, to be allowed to call his attorney was denied. (KIL. p. 52-53, l. 14-5). At 5:25 P.M., appellant observed a Mr. Gainey attempting to gain entrance through the locked, bolted and closed doors of The Coin Mart, (KIL. p. 65). A store employee, Mr. Kurt Reichert, let Mr. Gainey in after unlocking the doors. (KIL. p. 65, l. 19-27).

Witness John Gainey testified that when he arrived at The Coin Mart at 5:25 P.M., on August 6, 1976, the doors were locked, that "Kurt" had to unlock the door to let him in. (KIL. p. 119-120).

Kurt Reichert testified that he is an employee at the Coin Mart and was so employed on August 6, 1976, while he was waiting on a customer, he observed three San Diego Police Officers enter the store. (KIL. p. 142, l. 24-25). Mr. Reichert recalled asking the police if he could unlock the doors and allow John Gainey to make a delivery at 5:25 P.M. (KIL. p. 144-145). At that time there were eight police officers in and about the store. (KIL. p. 146). At the time Mr. Reichert let the customer out of the store, Reichert observed a Chula Vista Police Officer enter the premises. (KIL. p. 147, l. 25-27).

Patrolman Daniel T. Trevino, Chula Vista Police Department, testified that on August 6, 1976, while on duty he received a call at approximately 5:40 P.M., to proceed to the Coin Mart to cover the San Diego Police Fencing Detail (KIL. p. 182-183). Trevino recalled seeing Mr. Olinger (the customer) exit The Coin Mart. (R. T. p. 185, l. 5-9).

On August 20, 1976, Officer Hamlin made an affidavit in Support of Search Warrant (C. T. p. 142-147) to re-search the Coin Mart, Honorable KENNETH JOHNS, Judge of the San Diego Municipal Court issued said Search Warrant (C. T. 148-150). Pursuant to said warrant, numerous items of alleged stolen property were seized (C. T. p. 117-124) at The Coin Mart. Officer Hamlin states that he believed

certain items of stolen property to be located within the Coin Mart because on August 6, 1976, he observed said items. (C. T. p. 145).

B. TRIAL TESTIMONY

Points IV through VIII hereinbelow set forth objections and issues that were raised at trial and in appellant's Motion for New Trial. (C. T. 178-183).

Immediately prior to trial, the Court heard appellant's Motion to Suppress Statements allegedly made by appellant to Officer Hamlin prior to a Miranda admonishment having been given. (R. T. 48-87) on August 6, 1976. The Motion to Suppress appellant's statements was denied (R. T. p. 87, l. 13) and Officer Hamlin was permitted to testify at trial regarding those statements. (R. T. 600-601).

At trial, the People called the following victims of burglaries.

1. LYNETTE QUON who testified that she is employed at Quon Mane's Imports and was so employed during the weekend of June 5-7, 1976. (R. T. p. 99). The following Monday she discovered Quon Mane's had been burglarized (R. T. p. 100). She identified People's Exhibits 5 through 7F as having been taken in the Quon Mane burglary (R. T. p. 102-117), charged in the Amended Indictment as Count I.

2. RAY FINNEY and VIRGINIA GRANT testified they were employed at Allan Adler store in La Jolla on January 27 and 30, 1976, when the store was burglarized twice and merchandise stolen. (R. T. p. 176-227). Ms. Grant identified People's Exhibits 8 through 12B as being merchandise taken in the Allan Adler burglaries (R. T. p. 184-202).

3. GILBERT MORTON, FRANCIS MORTON and GILBERT MORTON III, testified that the Gilbert and Francis Morton residence was burglarized on June 10, 1976. All three Mortons testified that they had property stolen in said burglary (R. T. p. 228-351). Mrs. Morton identified People's Exhibit 13 as a set of coins stolen in the

burglary (R. T. p. 259). Gilbert Morton III, identified People's Exhibits 36 through 38E as coins and coin holders taken in the Morton burglary. (R. T. p. 281-351).

Although all the Morton property was taken in one burglary on June 10, 1976, Appellant was charged with two counts of violation of Penal Code Section 456.1 in regard to the Morton property, counts four and fourteen (C. T. p. 161-162) (Later Counts four and five [C. T. p. 957]). The Court declared a mistrial as to these counts when the jury was unable to reach a verdict (C. T. p. 209).

4. ARTHUR HANKS, JR., testified that his business, La Douce France, was burglarized on December 31, 1976, certain art objects and statues were stolen. (R. T. p. 352-378). Mr. Hanks identified People's Exhibits 26 through 30 as having been stolen in said burglary. Mr. Hanks identified the property shown in photographs (People's Exhibits 52-53B) as also having been stolen in said burglary. (R. T. 365-369). Charged in the Amended Indictment as Count III.

5. GEORGE BABCOCK testified that he is a partner in Ideas, Incorporated, an antique, Indian jewelry, gallery and boutique store, that in June 1976, Ideas, Inc., suffered a burglary. (R. T. p. 379-406). Mr. Babcock identified People's Exhibits 14 through 16E as being merchandise taken in the June 1976 burglary (R. T. p. 385-393). Charged in the Amended Indictment as Count VII.

6. EEJI SUENAGA, owner of Studio Suenaga, testified that his business was burglarized on July 2, 1976, and silver jewelry was stolen. (R. T. p. 407-416). Mr. Suenaga identified People's Exhibit 18 as merchandise stolen in the July 2, 1976, burglary. (R. T. p. 410-411). Charged in the Amended Indictment as Count IX.

7. ROBERT and JUNE ANDREW testified that their business, the College Watch Shop, was burglarized in March, 1976, and jewelry stolen (R. T. p. 417-457). Mrs. Andrew identified people's Exhibits 33 through 33G as jewelry stolen in the March 1976 burglary. (R. T. p. 428-435). Charged in the Amended Indictment as Count VI.

8. LINDA M. HUNT testified she was employed at La Jolla Jewelers on February 22, 1976, when that business was burglarized (R. T. p. 458-467; 489-507) and jewelry stolen. Ms. Hunt identified People's Exhibits 34 through 34C as merchandise stolen from the La Jolla Jewelers burglary. (R. T. p. 464-467). Charged in the Amended Indictment as Count VIII.

9. MR. DONALD STEM testified that on June 17, 1976, a watch was stolen from his business, the Watch Stem. (R. T. p. 471-488). Mr. Stem identified People's Exhibit 32, a watch, as that watch stolen on June 17, 1976 (R. T. p. 474). This item was charged in Count 11 which was mistrialed when the jury could not reach a verdict. (C. T. p. 209).

10. BRADRICK C. FARRAR, the owner of Sandersons, La Jolla, California, testified that two show windows were broken on June 30, 1976, and jewelry stolen. (R. T. p. 508-522). Mr. Farrar identified People's Exhibit 20, one blue lapis ring as having been taken in the above theft (R. T. p. 512). This ring was charged in Count 10 of the Amended Indictment (R. T. p. 954) which was mistrialed after the jury failed to reach a verdict (C. T. p. 209).

Officer Hamlin testified at trial that on August 6, 1976, he received information that Appellant was possibly in possession of stolen property. (R. T. p. 596). Hamlin proceeded to The Coin Mart with Mr. Quon who identified some merchandise on display as his property (R. T. p. 597). Prior to proceeding to The Coin Mart, Hamlin was aware that appellant was the owner. (R. T. p. 597, l. 16). At The Coin Mart, Hamlin contacted appellant, identified himself as a police officer and stated he was investigating the possibility that appellant was in possession of stolen property. (R. T. p. 600). Officer Hamlin pointed to the particular jade items in question and asked (without

Miranda Admonishment) appellant where he had gotten said items. Appellant allegedly stated he bought all of his jade from one manufacturer; (R. T. p. 600, l. 18-22), that he had possibly bought some of the items over the counter; that he had bought a couple of stores out and that maybe the items came from those stores. (R. T. p. 601, l. 7-11).

Officer Hamlin testified that he obtained a telephonic search warrant for a search of the Coin Mart and appellant's residence and searched said places. (R. T. p. 606). Hamlin testified that he recovered People's Exhibits 5, 6, 6A, 7, 7A, 7F, 7E, 8, 9, 10, 11, 12, 13, 14, 16, 17, 17A, 18, 20 were seized by the police from the Coin Mart. (R. T. p. 613-625).

Officer Gurney Warnberg, San Diego Police Department, testified that on August 6, 1976, he participated in the search of appellant's residence and seized People's Exhibits 21, 22, 23, (ABCD), 24, 24B, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 52, 53 and 68. (R. T. p. 708-728). Officer Warnberg testified that on August 20, 1976, he participated in the execution of a search warrant for the Coin Mart, he identified People's Exhibits 33, 34, 35, 36, 37, 38 (ABCDE) from the business (R. T. p. 734-740).

The People rested their case after the testimony of Officer Warnberg (R. T. p. 868). Appellant and Co-Defendant, Barbara Jean Altbaum (appellant's wife) made Motions for Judgment of Acquittal. (R. T. p. 868; 875). The Motion as to Barbara Altbaum was granted as to all Counts (R. T. p. 885) and denied as to appellant (R. T. p. 924). Appellant then rested his case without calling any witnesses. (R. T. p. 934). Appellant moved to consolidate all the multiple Counts (R. T. p. 945) as to the 6th of August 1976, into one Count and all Counts relating to the 20th of August 1976, into one other Count (R. T. p. 946, l. 12-16). The Court modified the indictment to eleven (11) Counts. (R. T. p. 953-954).

Appellant objected to the jury being instructed as follows:

"When a defendant is found in possession of articles soon after they were stolen, the possession of such stolen property, accompanied by no explanation, or any unsatisfactory explanation of the possession, when asked for an explanation by a police officer, or when such possession is accompanied by suspicious circumstances, an inference that the goods were received with knowledge that they had been stolen is justified. (R. T. p. 966, l. 20-26).

The jury returned a verdict of guilty as to seven (7) Counts and mistrialed the remaining Counts. (C. T. p. 209).

On April 18, 1977, appellant's motion for a new trial was denied by the trial court (C. T. 217). That same day, appellant was sentenced to state prison for the term prescribed by law. The sentences on Counts I and II were to be served consecutively, while the terms on Counts III, VI through IX, were to be concurrent with Count II (C. T. 184-185).

REASONS FOR GRANTING THE WRIT

I

The Decision Below Is In Conflict With The Fourth Amendment

Appellant complains that the August 6, 1976, search of the Coin Mart was done in violation of the Fourth Amendment to the United States Constitution. In particular, appellant asserts that the search and seizure should not have been conducted by the authorities prior to a warrant being issued. Although the Coin Mart was "open to the public" at the time the police entered, it was not open for the purposes for which the police entered, namely, to conduct a search and seizure. However, the police went even further than to merely enter the store, they actually "seized" the store by locking the doors and holding appellant, his employees and all merchandise therein, and

began to search and inventory property before the telephonic search warrants were secured.

It should also be noted that no exigent circumstances were shown by the police for the seizure prior to a warrant being issued. From Officer Hamlin's testimony, it appears clear that he and Mr. Quon entered the Coin Mart, identified stolen merchandise, and left without being detected. There was no testimony that the officers had a belief that the property from the June 5, 1976, burglary was going to be concealed or disposed of prior to a warrant being issued. "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police . . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from that constitutional mandate that the exigencies of the situation made that course imperative." *McDonald v. U.S.* (1948) 335 US 451, 455.

II

The Decision Below Is In Conflict With The Fourth Amendment

An affidavit which omits altogether to state the time relied upon has been held insufficient to show probable cause for the issuance of a search warrant. *Staker v. United States* (1925, CA6) 5 F2d 312; *Kohler v. United States* (1925 CA9) 9 F2d 866; *Chin Kay v. United States* (1962 CA9) 311 F2d 317.

It is argued by petitioner that the affidavit in support of the search warrant for petitioner's residence is totally lacking in probable cause. In particular, the informant's statements in Officer Hamlin's affidavit fail to indicate *when* petitioner and the informant had the alleged conversation in which petitioner was quoted as saying he

(petitioner) ". . . has taken stolen items to his residence for safekeeping . . ."

In their opinion, the Court of Appeal, Fourth Appellate District, apparently misunderstood the above argument by petitioner. At page 7 of said Opinion, the Court said, "The affidavit discloses that Officer Hamlin had spoken with the informant within the past week. We cannot say as a matter of law that a statement of such young age is for that reason unworthy of weight as basis for the issuance of a search warrant."

In primary consideration in determining the staleness of the informant's information is not when he gave such information to the police, but the time which the informant observed the illegal conduct, or as in the instant case, had the alleged incriminatory conversation with the appellant.

In *Chin Kay v. United State, supra,* District Judge Murry, dissenting from an opinion which held an affidavit sufficient to authorize issuance of a search warrant, noted that neither at trial nor appeal was it pointed out that although the first paragraph of the affidavit stated that on or about September 20, 1960, the affiant had received information from a federal agent of certain events and conversations with the defendant which indicated that the defendant was in illegal possession of narcotics, there was no statement in the affidavit as to the date on which the events and the conversation took place. The dissent said that seemingly the majority opinion overruled, perhaps inadvertently, *Kohler v. United States, supra,* and *Polds v. United States* (1932, CA9) 55 F2d 866, which specifically held that an affidavit for a search warrant which failed to state the time of the occurrence of the offense on which the affidavit was based was insufficient to show proper cause for the issuance of a warrant.

The affidavit fails to state any other sufficient basis for probable cause to believe stolen property would be located in the appellant's residence located some distance from The Coin Mart.

III

The Decision Of The Court Below Is In Conflict With This Court's Ruling In *Miranda v. Arizona*

Appellant contended at the time of trial, and now contends that prior to any questioning, appellant should have been advised of his "Miranda" rights *Miranda v. Arizona* (1966) 384 U.S. 436, 16 L.ed. 2nd 694, 86 S.Ct., 1602; *People v. Dorado* (1965 62 Cal.2d 338, 398 P.2d 361), and that any alleged statements made to Sgt. Hamlin should not have been admitted during the trial. (R. T. p. 48-87).

Under *Miranda, supra,* the duty of the police to advise a defendant of his rights arises "when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." It was specifically noted by the court that "Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . In such situations the compelling atmosphere inherent in the process of incustody interrogation is not necessarily present."

In *People v. Arnold* (1967) 66 Cal.2d 438, 448, 58 Cal.Rptr. 115, 426 P2d 515), the California Supreme Court recognized that custody could occur other than by the physical deprivation of a subject's freedom of action in any significant way. It was there held that custody occurs if a suspect "is led to believe, as a reasonable person," that he is being deprived or restricted of his freedom of action under pressures of official authority. (See *People v. Kelley* (1967) 66 Cal.2d 232, 246 (57 Cal.Rptr. 363, 424 P2d 947).

In *People v. Kelley, supra,* (at page 245), the Court discussed the practical application of the *Miranda, supra,* rules:

> "The rule is that a confession is inadmissible when at the time it is obtained (1) the investigation no longer is a general inquiry into an unsolved crime but has begun to focus on a particular suspect, (2) the suspect is in custody, (3) the authorities have carried out a process of interrogations that lends itself to eliciting incriminating statements, and (4) the authorities have not effectively informed defendant of his rights to counsel or of his absolute right to remain silent, and no evidence establishes that he has waived these rights." *People v. Dorado,* 62 Ca.2d 338, 353-354 (42 Cal.Rptr. 169, 398 P.2d 361); *People v. Stewart,* 62 Ca.2d 571 (43 Cal.Rptr. 201, 400 P.2d 97); *Miranda v. Arizona,* 384 U.S. 436 (16 L.Ed2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974).
>
> "The second issue, whether defendant was in custody at the time she made the statement, presents the crucial problem of the case. Although we have consistently and expressly held that custody constitutes an essential element of the accusatory stage, we have recognized that custody could occur in a situation in which defendant had not been arrested but his freedom of movement curtailed. In the instant case we are called upon to define more precisely the elements in the curtailment of that freedom of movement . . ."

The admission into evidence of Appellant's statements was prejudicial error. Self incrimination deemed to have resulted from an improperly received admission does not necessarily require reversal, as distinguished from an improperly admitted confession. (*People v. Stout,* 66 C2d 184, 57 Cal.Rptr. 152, 424 P2d 704). Under a provision of the constitution of California (See Const. Art. VI, Section 13), an appellate court is required to disregard error that is non-prejudicial, (*People v. Merchant,* 260 CA2d 875, 67 Cal.Rptr. 459), and federal rights are concerned if the error is non-prejudicial beyond a reasonable doubt. (*Chapman v. California,* 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24

ALR3d 1065, reh den 386 U.S. 987, 18 L.Ed.2d 241, 87 S.Ct. 1283.) This means that before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. Stated differently, the reviewing court must determine whether the prosecution has proved beyond a reasonable doubt that the error in receiving the admission in evidence did not contribute to the verdict obtained.

Immediately prior to the trial of this matter, defense counsel made a Motion In Limine to have suppressed certain statements alleged to have been made by appellant on August 6, 1976, to Sgt. Hamlin. (R. T. p. 50-87). Appellant's position was that Sgt. Hamlin should have admonished Appellant of his "Miranda" rights prior to questioning appellant and soliciting the statements.

Sgt. Hamlin testified that in August 1976 while assigned to fencing detail of the San Diego Police Department (R. T. pg. 49 1. 14), at that time he was assigned to work a stolen property case against appellant (R. T. p. 49, 1. 1).

That on August 6, 1976, he went to appellant's business the "Coin Mart" located in Chula Vista, California, with a Mr. King Quon (R. T. p. 50, 1. 20); that after he and Mr. Quon entered the Coin Mart, Mr. Quon indicated to Sgt. Hamlin that he recognized some items that he (Mr. Quon) felt were his property (R. T. pg. 50, 1. 23-26); that Sgt. Hamlin and Mr. Quon exited the business and compared the items identified by Mr. Quon against a list of stolen property previously prepared by Mr. Quon (R. T. p. 51, 1. 4-12); that some of the items identified by Mr. Quon inside the business matched those on the list (R. T. p. 51, 1. 13-15); that Sgt. Hamlin re-entered the store and contacted appellant, identified himself as a police officer, indicated that he was conducting an investigation of possible stolen property in the Coin Mart (R. T. p. 51-52, 1. 23). Appellant was then directed to one of the glass display cases in the front portion of the store where Sgt. Hamlin pointed out

some items of jade that were within the case and asked Appellant where he had gotten these jade items (R. T. p. 52, 1. 8-12).

On cross-examination, Sgt. Hamlin testified that prior to his going to the business with Mr. Quon, he was aware that Judge Gill (later the issuing magistrate) had been provided a list of the property stolen from Mr. Quon (R. T. p. 62, 1. 1-2), that six or more officers accompanied him to Mr. Altbaum's business (R. T. p. 62, 1. 11-12); that prior to going to the business he had received information that appellant was possibly in possession of stolen property (R. T. p. 63, 1. 14-15); that he had been working the "Altbaum Case" for a "year or maybe more" (R. T. p. 65, 1. 3); that immediately after the arrest of appellant, and while still at the business, Sgt. Hamlin called a former police officer and partner of his to relate that he had successfully arrested Appellant (R. T. p. 65, 1. 4-14); that Sgt. Hamlin had taken the Quon stolen property list to the District Attorney's Office earlier in the afternoon of August 6, 1976, (R. T. p. 65, 1. 19); that prior to going to the business with Mr. Quon, Sgt. Hamlin had already prepared two search warrants, one for the business and the other for appellant's residence (R. T. p. 70, 1. 18-22); that prior to going to the business he ascertained that the appellant was the owner of the business (R. T. p. 70-71, 1. 23-2).

Sgt. Hamlin testified that while he was questioning appellant, he required appellant to stay there during the "investigation" (R. T. p. 68, 1. 11-24). Sgt. Hamlin acknowledged that prior to appellant answering any questions about the jade, no admonishments of constitutional rights were given. (R. T. p. 61, 1. 3).

Mr. Altbaum testified that the Motion In Limine that while in his business on August 6, 1976, Sgt. Hamlin had approached him and said that he had a few questions to ask him (appellant) (R. T. p. 81, 1. 4); appellant testified during the pre-trial motions that during this initial conversation with Sgt. Hamlin he did not feel free to leave (R. T. p. 52, 1.

3-5) because there was a third observer who seemed to be a type of back-up, "and it was my feeling that he was there to possibly stop any exit from the premises, if the first gentleman didn't." (R. T. p. 52, 1. 8-10).

In answering Sgt. Hamlin's inquiry as to where he had "come by the jade that he had in the store there" (R. T. p. 52, 1. 23-34), appellant allegedly gave three explanations as to where he obtains jade.

(a) "his first response was that he purchased all of his jade from one manufacturer" (R. T. p. 53, 1. 6-7); (b) "He stated that the more he thought about it, sometimes he buys jade over the counter from people who walk in off the street." (R. T. p. 53, 1. 13-15); (c) "He stated that he had bought out the stock of two different stores, and that maybe the jade came from those two inventories." (R. T. p. 53, 1. 20-22).

Sgt. Hamlin testified that after asking appellant where he had gotten the jade and after having received appellant's statements hereinabove set out, he asked appellant, ". . . if he had any receipts or invoices that would reflect the purchase of any of these items in the case." (R. T. p. 58, 1. 5-7).

The Honorable Daniel C. Leedy denied appellant's Motion to have the statements excluded (R. T. p. 86-87).

IV.

The Decision Of The Court Below Is In Violation Of The Fourth Amendment And Is In Conflict With *Wong Sun v United States*

As is indicated by Sgt. Hamlin's Affidavit in Support of the Search Warrant of August 20, 1976 (hereinafter Warrant #3), (page 4), Sgt. Hamlin stated that he based his information for said affidavit from his observations while in appellant MARTIN LAWRENCE ALTBAUM'S business executing warrants #1 and #2 (C. T. p. 41-42).

The application of the fruit-of-the-poisonous tree

doctrine was stated in *Wong Sun v. U.S.*, 371, U.S. 471, CT. 407;

> "The exclusionary rule has traditionally barred from trial physical tangible materials obtained either during or as a result of any unlawful invasion . . ."

In applying the "poisonous fruit" doctrine, the Court, in *People v. Johnson*, (1969) 70 C2d 541, 75 C.Rptr. 401, said

> "We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather the more apt question in such case is whether granting establishment of the primary illegality, the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

The rule of *Wong Sun, supra*, was applied by the California Supreme Court in *People v. Bilderback*, 62 C2d 757. In that case the defendant argued that his confession should be excluded since he confessed only because he was confronted with illegally obtained evidence. Although reversing on other grounds, the Court discussed that contention:

> "That the prosecutor may not profit directly or indirectly from an illegal search has been the keystone of the rule excluding illegally obtained evidence . . ."

As appears from the affidavit of Sgt. Hamlin in support of Warrant #3 and the Police Report following that search, Sgt. Hamlin observed certain items during his search of the business prior to and subsequent to the issuance of Warrants #1 and #2. (C. T. p. 44). It is the appellant's contention that the seizure of the business at 255 Third Street was illegal and therefore any evidence observed

while unlawfully on said premises is the "poisonous fruit" of such illegality and must be suppressed.

V

The Decision Of The Court Below Is In Violation Of The Fourteenth Amendment

Appellant contends that there was no evidence to support the finding of the jury that appellant was guilty of violation of California Penal Code Section 496.1.

The landmark case on the question whether a denial of due process of law inheres in a conviction of crime at the conclusion of a trial is *Thompson v. Louisville,* (1960) 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, 80 ALR 2d 1355. In that case Justice Black speaking for a unanimous Court, found that a criminal conviction based upon the lack of any evidence violated the due process clause of the United States Constitution.

Appellant presented no evidence in defense and rested his case immediately after the prosecution rested. Appellant contends that the evidence presented at trial taken as a whole, was insufficient to support his conviction of seven (7) counts of violation of Penal Code Section 496.1, particularly that there was no evidence of his "knowledge" that the property was stolen (R. T. p. 987-990; C. T. p. 180-183).

A conviction for receiving stolen property cannot withstand appellate scrutiny unless substantial evidence was presented to the trier of fact that (1) the property was received, concealed, or withheld by the accused; (2) such property had been obtained by theft or extortion; and (3) the accused knew that the property had been so obtained. (*People v. Scaggs,* (1957) 153 C.App.2d 339, 314 P2d 793).

There is no dispute on appeal that the property alleged to be stolen property in Counts 1, 2, 3, 6, 8 and 9 was in fact stolen property. However, appellant contends that the evidence presented by the People fails wholly to

demonstrate, either directly or circumstantially, his knowledge of the stolen character of the property, and therefore, violates the due process clause. (R. T. p. 987-990; C. T. 180-183).

After acknowledging that he had shown no direct knowledge (R. T. p. 879, l. 1-9), the prosecutor pointed to the following "circumstantial evidence" to prove appellant's guilty knowledge of the stolen nature of the property:

1. The number of items of stolen property (R. T. p. 879, l. 21-22);
2. The value of the items of stolen property (R. T. p. 880, l. 2-30);
3. Alleged recent time of possession (Supp. R. T. p. 12);
4. No invoices or receipts produced by appellant for purchase of the items of stolen property (Supp. R. T. p. 1);
5. The nature of appellant's business as a second-hand store and pawn shop (Supp. R. T. p. 12);
6. The locations of and nature of the items found in appellant's residence (Supp. R. T. p. 14, l. 16);
7. The Morton letter (applied to counts on which a mistrial was declared) (Supp. R. T. p. 18), and
8. Statements by appellant to Sgt. Hamlin regarding acquisition of jade items (Supp. R. T. p. 20).

It is contended by appellant that the above items of circumstantial evidence do not provide any evidence of appellant's knowledge of the stolen nature of the items.

It is felt that an analysis of the above "circumstances" would be helpful in demonstrating that, whether considered independently or jointly, these facts do not

show knowledge as required by Penal Code Section 496.1, and the Fourteenth Amendment.

The mere number of items found in appellant's business and residence would imply knowledge based solely on quantity. Appellant is aware of no cases which implies circumstantial evidence solely by counting the number of stolen items. As was testified at the trial, appellant's business contains literally tens of thousands of items of many types for resale. The property in question was consistent in nature with appellant's other merchandise.

The People's assertion that the total value of the merchandise is circumstantial evidence of "knowledge" is meaningless where the prosecutor did not show what price appellant had paid for the merchandise. (Supp. R. T. 9-11). If there had been some great disparity in the purchase price, the above evidence of value might have given circumstantial weight. (*People v. Barnes,* (1962) 210 CA2d 740, 26 C.Rptr. 793). In this case, the prosecutor did not show any disparity, nor did he attempt to show that appellant's financial means were such that he could not have paid a fair and reasonable price.

The prosecutor argued that appellant was in "recent" possession of the merchandise. (Supp. R. T. p. 11). Of the counts appellant was convicted, the burglaries occurred as early as December 31, 1975 (Count 3), and the latest being June 5, 1976 (Count 1) (Supp. R. T. p. 11-12).

Although the appellate courts have held that "recent possession of stolen property may be considered as a circumstance from which knowledge may be inferred, they have also defined that "recent" possession is ". . . The possession of it (stolen property) immediately or soon after it was stolen . . ." (*People v. Jacobs,* 73 C.App. 334, 339).

In the instant case, the last burglary occurred some two months prior to appellant being in possession (Supp. R. T. 11-12). The prosecutor admitted at the Motion for New Trial that recent possession alone would not support appellant's conviction (R. T. p. 994, l. 15).

The prosecutor argued to the jury that appellant had produced "not one record, not one pawn ticket, not one receipt or invoice for any of this property (Supp. R. T. p. 14, l. 1-2).

It is not appellant's burden to produce evidence of any type. The above reference to a fact of such evidence should be given no weight, in addition, appellant believes that such a comment directly refers to appellant's exercise of his Fifth Amendment right not to testify or present evidence and as such was prejudicial misconduct by the prosecutor.

The prosecutor argued that as a result of the nature of appellant's business as a pawn shop, and as evidenced by license regulations, appellant has "a higher stand of care, a higher burden, a higher duty . . . to provide records, to be careful, to be on the lookout for property that is stolen" (Supp. R. T. p. 14, l. 14-21).

The issue is one of actual knowledge of the stolen nature of the property not what the appellant's occupation is. However, it should be pointed out that the contrary conclusion could be reached from the thrust of the prosecutor's argument. The fact that appellant has such a great quantity of all types of merchandise and buys in vast volume make the amount of merchandise seized a small portion of his inventory.

The prosecutor argued that the "unique" items of stolen merchandise was found in the Altbaum's residence so that they could not be identified by the victims or friends of the victims had they been in the business (Supp. R. T. p. 16, l. 5-18).

Again, appellant objects to this type of alleged circumstantial evidence as mere conjecture on the part of the prosecutor or jury, if they relied upon it.

The Morton Letter dealt solely with Counts 4 and 5 and as the jury was unable to reach a verdict in these counts appellant will not comment on said argument (Supp. R. T. p. 18-20).

The prosecutor argued that the alleged statements of appellant to Sgt. Hamlin (argued in Point III above,) indicated an unsatisfactory explanation by appellant as to his coming into possession of the jade items (Count 1). (Supp. R. T. p. 20-21).

As argued above (Point IV), appellant's statements should not have been admitted into evidence.

VI

The Decision Below Violates The Fifth Amendment

As was noted above, appellant exercised his Fifth Amendment privilege not to testify at the trial of this matter.

It is clear that any direct comment upon appellant's failure to testify would be reversible error. *Griffin v. State of California*, 85 S.Ct. 1229, 380 U.S. 609, 14 L.Ed. 2d 106, rehearing denied 85 S.Ct. 1797, 381 U.S. 957, 14 L.Ed. 2d 730. It is also contended by appellant that any indirect reference to appellant's remaining silent also violates the Fifth Amendment. Further, that the trial court erroneously instructed the jury in such a manner as to comment appellant's exercise of said privilege.

At the request of the prosecution, and over the objection of appellant's counsel, the trial court gave the following instructions to the jury: (R. T. p 985-987)

> "Where a defendant is found in possession of articles soon after they were stolen, the possession of such stolen property, accompanied by no explanation, or any unsatisfactory explanation of the possession, when asked for an explanation by a police officer, or when such possession is accompanied by suspicious circumstances, an inference that the goods were received with knowledge that they had been stolen is justified." (R. T. p. 966, l. 20-26).

Appellant objects to the above instruction in two respects: (1) said instruction did not fit the facts of the instant case, and therefore did not properly state the law, and (2) said instruction reflects on appellant's exercise of his Fifth Amendment right to remain silent.

The above instruction indicated to the jury that possession of such stolen property must be explained by the appellant if asked for an explanation by a police officer. (R. T. p. 966).

The above instruction directly indicated to the jury, and could reasonably be inferred by the jury, that appellant has the burden of coming forward and explaining his possession of the property. There is no burden on appellant to produce evidence of his innocence. Particularly, in a case where the appellant exercises his right not to testify and to remain silent, the above instruction is prejudicial error. (C. T. p. 179-180).

In a criminal prosecution, it is the duty of the trial court to protect a defendant's Fifth Amendment rights, and while declaration of mistrial is an appropriate measure to protect a defendant who has exercised his privilege not to testify when a prejudicial proscribed comment has been made thereon, denial of this protection is a denial of a constitutional right, is an error at law, and is ground for which a new trial may be granted.

CONCLUSION

For the foregoing reasons, the Petitioner, MARTIN L. ALTBAUM, respectfully prays that a Writ of Certiorari issue to review the decision below.

December 13, 1978 HARRINGTON WADDELL & BRIGGS

By PATRICK J. BRIGGS
PATRICK J. BRIGGS
Attorney for ALTBAUM

MARTIN L. ALTBAUM, Petitioner

versus

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent

Attorney:

HARRINGTON, WADDELL & BRIGGS
520 West Ash St., Ste. 300
San Diego, CA 92101
(714) 238-1355

CERTIFICATE OF MAILING

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which County the within mentioned mailing occurred, and not a party to the subject cause. My business address is 520 West Ash Street, Suite 300, San Diego, California 92101.

I served the PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL – STATE OF CALIFORNIA, of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively, as follows:

EVELLE J. YOUNGER, Attorney General
101 West A Street, Suite 600
San Diego, California 92101

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California, on DEC 18 1978.

I declare under penalty of perjury that the foregoing is true and correct.

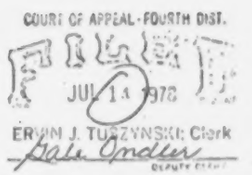
Executed on DEC 18 1978 at San Diego, California.

PATRICK J. BRIGGS
PATRICK J. BRIGGS

CERTIFICATE OF MAILING

APPENDIX A

IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA



The People of the State of California,
Plaintiff and Respondent

versus

MARTIN LAWRENCE ALTBAUM,
Defendant and Appellant

4 Cr. No. 8639
(Sup. Ct. No.
CR 39570)

APPEAL from a judgment of the Superior Court of San Diego County. Daniel C. Leedy, Judge. Reversed in part; affirmed in part.

A jury found defendant Martin Lawrence Altbaum guilty of seven counts of receiving stolen property. (Pen. Code, §496, subd. 1.) He was sentenced to state prison, counts I and II to be served consecutively; counts III, VI, VIII, VII and IX to be served concurrently with count II.

On appeal Altbaum contends (1) his motion under Penal Code section 1538.5 should have been granted because the first search of his store followed an illegal police seizure of the premises while a telephonic search warrant was being obtained; this illegality "poisoned" a later search of the store pursuant to a later warrant; and the telephone warrant to search his residence was based upon a defective affidavit; (2) it was error to admit into evidence statements he made to police before being advised of his *Miranda* rights; (3) there is no evidence he *knew* the property was stolen; (4) it was prejudicial error to instruct the jury such knowledge could be inferred from possession of stolen property accompanied by *no* explanation; (5) the

prosecutor was guilty of misconduct during final argument; and (6) in any event, his seven convictions must be reduced to one, there being no evidence of *when* he received the property.

FACTS[1]

We view, as we must, evidence in the light most favorable to respondent. (*People v. Mosher*, 1 Cal.3d 379, 395.) In June, 1976, Quon Mane, Inc., an oriental import store, was burglarized and approximately $57,000 in retail value merchandise was stolen. Detective Hamlin, San Diego Police Department, received information from a "reliable informant" that Altbaum was in possession of recently stolen property. At about 5:30 p.m. on August 6, Detective Hamlin and Mr. Quon, owner of Quon Mane, Inc., went to Altbaum's pawn shop and second-hand store, the Coin Mart. The store was then open for business. Quon first entered the business alone — per Hamlin's instruction — viewed and identified a number of unique jade pieces — bracelets, bands and Buddhas jewelry as stolen from his store. He reported his views to Hamlin.

Hamlin then entered the Coin Mart with Sgt. Berglund and found Altbaum. After identifying himself as a police officer, Hamlin announced he was conducting an investigation and believed there might be stolen property on the premises. Altbaum asked what property he was talking about, so Hamlin walked with him to the display cases and pointed out the items Quon had identified. Hamlin then asked Altbaum "how he came by the jade." At first; Altbaum claimed he bought all his jade from one manufacturer. Next he said he might have bought some over the counter, but finally said the jade might have come from two inventories he had bought out from other stores.

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[1]We summarize not only the facts in evidence at the trial, but also the matters adduced on the 1538.5 motion to suppress as well as the special motion during trial relevant to the *Miranda* issue.

Hamlin next asked Altbaum if he had any receipts or invoices showing ownership of the jade. Hearing this, Altbaum just stood, saying nothing. At this point, Hamlin, for the first time, advised Altbaum of his *Miranda* rights.

Thereafter, Hamlin telephoned to obtain search warrants, and at the same time other officers locked the door to the store.

About 6:30 p.m., after a three-way telephone conversation, the municipal judge issued telephonic search warrants authorizing searches of the Coin Mart and Altbaum's home. To secure the search warrant, Hamlin repeated to the magistrate, under oath, these facts: From his experience as an officer on the fencing detail, he knew individuals who traffic in stolen property frequently maintain a storage area at a different location and frequently also keep selected items for their personal use; within the past week he had received information from a reliable confidential informant who stated that on "numerous occasions" he had had conversations with Altbaum in which Altbaum stated he had taken stolen items to his residence for safekeeping and also for his and his family's personal use.

Armed with the telephonic warrants, the police immediately searched both the store and Altbaum's home. Altbaum had in his possession scores of items later identified as stolen in more than a dozen burglaries in the San Diego area between December, 1975 and July, 1976. From the Coin Mart they recovered art objects and jade stolen from Quon Mane's in June (count I), jewelry stolen from Allan Adler's in January (count II), miscellaneous merchandise stolen from Ideas, Inc., in June (count VII), jewelry stolen from La Jolla Jewelers in February (count VIII), jewelry stolen from Studio Suenaga in July (count IX), as well as other property stolen in June from Mr. and Mrs. Morton, from the Watch Stem, and from Sanderson's. At Altbaum's home, police found more art objects and jade from Quon Mane's, more jewelry from Allan Adler, and

also antiques stolen from La Dolce France in December (count III). While some of these items were on display in the house, others were hidden away in closets.

Mrs. Andrew, another burglary victim, was shown the property seized from Altbaum on August 6 but was unable to identify any as hers. However, when she paid the Coin Mart a visit on August 19, she saw in the display cases at least a dozen items she identified as items stolen from her College Watch Shop in March.

Based upon this new information, Hamlin obtained another warrant to search the Coin Mart on August 20. In the search which followed, police seized the items stolen from the College Watch Shop (count VI) and also recovered more property stolen from Allan Adler and La Jolla Jewelers.

At the close of the People's case, Altbaum rested without presenting any evidence.

ISSUES

Altbaum contends the August 6 search of his store was illegal for the reasons:

(1) the police engaged in a search and seizure at the Coin Mart before a valid search warrant was issued and that therefore search and seizure was unreasonable; and

(2) the search warrants issued August 6, 1976, were unreasonable as there was not probable cause for their issuance.

He relies upon *Shuey v. Superior Court*, 30 Cal.App.3d 535 (*Shuey* I) and *People v. Shuey*, 13 Cal.3d 835 (*Shuey* II). Both *Shuey* cases hold, absent an emergency, the "securing" of premises pending arrival of a search warrant is itself an illegal seizure which invalidates any later search and seizure. Altbaum maintains the same rule should apply here. The Shuey cases involved a private residence;

nevertheless he argues his business, although open to the public, was not open to the police to conduct an illegal occupation.

The *Shuey* cases are not in point for several reasons: First lack of probable cause to make an arrest was either conceded (*Shuey* I) or law of the case (*Shuey* II). Here, the Attorney General points to facts known to the police before any "securing" of the premises, giving rise to probable cause to arrest Altbaum.

The police here had not only information from a reliable informant but also Quon's positive identification of multiple items of stolen property in Altbaum's possession and Altbaum's multifaceted, evasive, responses to the police question concerning his acquiring possession of the stolen items. Such facts would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that Mr. Altbaum was guilty of a crime. (*People v. Ingle*, 53 Cal.2d 407, 412-413.)

The applicable rule, therefore, is stated in *People v. Slocum*, 52 Cal.App.3d 867, 879:

> "Where probable cause to arrest exists and there is danger that incriminating records may be destroyed pending arrival of the warrant, officers are justified in securing the premises under the emergency doctrine."

The trial court here correctly distinguished the *Shuey* I and II rule. Further, substantial evidence supports the court's finding — that Mr. Quon's observations of the stolen goods, his report to the police, as well as the non-explanatory response of Altbaum to police — all occurred *before* the doors were locked. Probable cause to arrest was manifested preceding the securing of the premises, therefore, no basis exists to suppress the fruits of the search.

Altbaum next contends both August 6 search warrants — for his business and his home — were improperly issued without probable cause. Altbaum argues the evidence

seized at his home on August 6 should have been suppressed because the affidavit failed to show the information supplied by the informant was current.

It is argued the information was stale, hence, unworthy of weight. (*Alexander v. Superior Court*, 9 Cal.3d 387, 393; *People V. Sheridan*, 2 Cal.App.3d 483.) The affidavit discloses that Officer Hamlin had spoken with the informant within the past week. We cannot say as a matter of law that a statement of such young age is for that reason unworthy of weight as basis for the issuance of a search warrant.

While the hearsay statements of the informant were not sufficient standing alone to justify issuance of the search warrants, yet the affidavit is not limited to those declarations. The affidavit contains the facts perceived, reported by Mr. Quon. The affidavit contained information of the affiant's own knowledge, his own expertise and experience.

The question we address is whether the affidavit as a whole sets forth facts "such as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain, a strong suspicion of the guilt of the accused. (People v. Govea . . . 235 Cal.App.2d 285, 296 . . .)" (*People v. Stout*, 66 Cal.2d 184, 192-193.)

> "The warrant can be upset only if the affidavit fails *as a matter of law* to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony. (People v. Govea, *supra*, at p. 297 . . . .)" (*People v. Stout, supra*, at p. 193; emphasis added.)

We conclude substantial evidence upholds the magistrate's finding of probable cause. (*People v. Benjamin*, 71 Cal.2d 296, 301-303.)

The evidentiary basis for the third search warrant derives from the items seized in the August 6 search of the Coin Mart. A Mrs. Andrew reported a burglary of her business, the College Watch Shop, and was called to the San Diego Police Department to examine the property recovered under the August 6 search warrant. Mrs. Andrew went to the Coin Mart and went into the open business premises and recognized two items taken in the burglary of her store. This forms a sufficient factual base for "probable cause" to issue the search warrant. Altbaum argues this is the "poisonous fruit" of the August 6 search. We have heretofore concluded the August 6 search warrants were issued properly; therefore, the contention fails.

Altbaum next contends the trial court erred in refusing to exclude from evidence all statements he made to police about the source of the jade — before being advised of his constitutional rights. After a special voir dire hearing, the judge denied the motion, on the ground his statements were made before a *Miranda* warning was required.

The "Miranda" rule was prompted by the recognition of the dangers inherent in "incommunicado interrogation of individuals" in a "police dominated atmosphere." (*Miranda v. Arizona*, 384 U.S. 436, 445 [86 S.Ct. 1602].) Its requirement of warning is triggered when the suspect is subjected to "custodial interrogation." (Id. at p. 444, 478.) Thus, custody is the critical element. However, every temporary detention — albeit a species of custody — must not be preceded by the admonishment. There must be a significant restraint. The point in time, when the transitory restraint becomes in any way significant and the warning required was bracketed thus by *People v. Manis*, 268 Cal.App2d 653, 667.

> "Temporary detention only slightly resembles custody, 'as the mist resembles the rain.'* True

*Longfellow: "The Day is Done."

> enough, a person temporarily detained has been subjected to some restraint and his freedom of movement has been temporarily restricted. But the person detained is in no sense accused but rather one merely suspected of misconduct. Since the police can make no valid accusation against him, we do not think the process has shifted from investigatory to accusatory [citation], or that an investigation has 'focused on an accused' [citation]. Only when suspicion focuses sharply enough to provide reasonable cause for arrest or charge does the relationship between the police and the person detained become that of accuser and accused."

(See also, *People v. Herdan*, 42 Cal.App.3d 300, 310, fn. 17; *People v. Murphy*, 8 Cal.3d 349, 362.)

Altbaum argues a *Miranda* warning was required before Hamlin undertook to question him at all because by then the investigation had obviously focused on him and because he was not free, or did not feel free, to leave during the questioning.

The motion was properly denied. In the first place, there was no custodial interrogation. It is true that a species of transitory restraint was present, inherent in the investigatorial process, the questions being put to Altbaum. But Altbaum was not under arrest; probable cause for arrest had not yet manifested itself.

The critical, second element necessary to give rise to probable cause to arrest for receiving stolen property — Altbaum's guilty knowledge of the stolen character of the jade — was not then known to the police. Altbaum still contends, here on appeal, that the requisite knowledge has not been proved.

Altbaum operated a second-hand store, a pawn shop. His possession of stolen property may have been completely innocent. Hamlin's questions could well have elicited exonerating statements. In this setting, the questions

asked did not constitute "interrogation" or "custodial interrogation" within the meaning of *Miranda*. Moreover, the trial court found Altbaum did not believe (or did not reasonably believe) that his freedom was restricted in any substantial way when the questions were asked. Since their conversation took place in Altbaum's place of business during business hours and lasted only five minutes, this finding that he was not in "custody" will be upheld on appeal. (*People v. Turnage*, 45 Cal.App.3d 201, 211.)

Altbaum next contends no substantial evidence supports his convictions. To support a conviction under Penal Code section 496, subdivision 1, there must be substantial evidence that (1) the property was received, concealed, or withheld by the accused, (2) such property had been obtained by theft or extortion, and (3) the accused knew that the property had been so obtained. (*People v. Scaggs*, 153 Cal.App.2d 339, 352.) Altbaum does not deny stolen property was in his possession but contends there is no evidence *he knew it was stolen*.

Knowledge that property was stolen is seldom demonstrable by direct evidence but may be inferred from circumstantial evidence. While possession alone will not support an inference of knowledge, possession of *recently* stolen property plus corroboration by statements or conduct of the defendant tending to show his guilt, is sufficient to support a conviction under Penal Code section 496, subdivision 1. (*People v. Vann*, 12 Cal.3d 220, 224.) Corroboration need only be slight. Here, substantial evidence supports Altbaum's convictions under count I (Quon Mane Imports) and count II (Allan Adler). The jury could reasonably infer his knowledge under these counts from his various conflicting stories about how he acquired the jade and from his concealment of items from both thefts at his home. Altbaum's simultaneous possession of the items from Quon Mane's and Allan Adler's and a great many other articles stolen from other victims over a seven or eight month period gives rise to a strong and rational suspicion that Altbaum is in the business of receiving

stolen property. The evidence supports convictions under counts I and II.

Altbaum next contends it was reversible error in giving, over objection, the following instruction:

> "Where a defendant is found in possession of articles soon after they were stolen, the possession of such stolen property, accompanied by no explanation, or an unsatisfactory explanation of the possession, when asked for an explanation by a police officer, or when such possession is accompanied by suspicious circumstances, an inference that the goods were received with knowledge that they had been stolen is justified."

Altbaum's claim the instruction did not fit the facts in that his possession was not "soon" after any of the property was stolen. During the August 6 search he was found in possession of property stolen from Studio Suenaga in July and from Quon Mane in June. (Counts IX and I.) Both burglaries were sufficiently recent to fall within the rule of *People v. Vann, supra*, 12 Cal.3d 220, 224.

Altbaum claims the "no explanation" portion of the instruction violated his Fifth Amendment right to remain silent and was based on pre-*Miranda* case law. We do not decide whether the words should have been omitted because factually they did not apply to either count I or II. Altbaum's possession of both the Quon Mane and the Allan Adler property was accompanied by suspicious circumstances — unsatisfactory, varied explanations concerning the source of the jade. As the instruction applied to counts I and II, any error was harmless beyond a reasonable doubt. (*Chapman v. California*, 386 U.S. 18 [87 S.Ct. 824].)

We reject Altbaum's claim a reversal is required because of misconduct by the prosecutor during final argument. The suggestion that Altbaum was a "fence" was a warranted, permissible inference under the evidence and a prosecution under Penal Code section 496, subdivision 1.

The reference to narcotics addicts was cured by the court's admonition to the jury.

Finally, the Attorney General acknowledges Altbaum's convictions must be reduced in number. Altbaum contends that at most he can be convicted of only one count, there being no evidence of when he received the various items of stolen property. Simultaneous receipt of items stolen from different sources is but one offense of receiving stolen property. (*People v. Lyons*, 50 Cal.2d 245, 275; *People v. Smith*, 26 Cal.2d 854, 859.)

However, the evidence here would allow two convictions since stolen property was found in Altbaum's possession on two different occasions. Stolen property in counts I, II, III, VII, VIII and IX was seized during the August 6 searches; other stolen property involved in counts II, VI and VIII was seized from him on August 20. Penal Code section 496, subdivision 1, prescribes both receiving stolen property and withholding it from its owner with guilty knowledge. Thus, regardless of the time Altbaum first obtained the various items, he may properly be convicted of a second offense based upon his withholding of stolen property after August 6.

The judgment is reversed as to counts III, VI, VII, VIII and IX; the judgment is affirmed as to counts I and II.

_____

J. Staniforth

WE CONCUR:

_____

P. J. Brown

_____

J. Weiner

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

SEP 20 1978

I have this day filed Order

HEARING DENIED

In re: 4 Crim. *No.* 8639

People

vs.

Altbaum

Respectfully,

G. E. BISHEL
Clerk

97371-877 1-78 3M OSI

APPENDIX C

IN THE

Court of Appeal, Fourth Appellate District
State of California

DIVISION ONE

4 Crim. No. 8639

FILED
ROBERT L. FORD, CLERK
SEP 27 1978
BY

REMITTITUR

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

VS.

MARTIN LAWRENCE ALTBAUM,

Defendant and Appellant.

SUPERIOR COURT NO. CR 39570

COUNTY OF San Diego

ROBERT L. FORD

I, [redacted], Clerk of the Court of Appeal, Fourth Appellate District, State of California, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on July 14, 1978 *and this opinion or decision has now become final.* The judgment is reversed as to counts III, VI, VII, VIII and IX; the judgment is affirmed as to counts I and II.

ENTERED

SEP 28 1978

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Judgment Book ..... Pg. ——

WITNESS my hand and seal of the Court this 13th day of September, 1978.

ROBERT L. FORD
[redacted], *Clerk*

By R. J. Smith *Deputy*

see

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